CHING YIK DEVELOPMENT SDN BHD & ANOR A

v.

WORDWARE DISTRIBUTORS (M) SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
LEE SWEE SENG JC
[SUIT NO: D-22NCC-1795-2010]
9 JULY 2012

CIVIL PROCEDURE: *Judgment - Variation - Third party chargor to loan - Bank obtained order for sale when loan defaulted - Chargor paid RM1.8 million to bank to avoid land being auctioned off - Chargor then claimed full settlement amount from borrower and guarantor - Default judgment obtained by chargor - Whether writ and statement of claim validly served - Whether terms of default judgment should be varied* C D

The first plaintiff ('P1') had charged its land to the bank for a loan given to the first defendant ('D1') in the sum of RM2,890,000. The second plaintiff ('P2') and the second defendant ('D2') had acted as guarantors for the said loan. Since D1 had defaulted in the loan repayments, the bank then proceeded with a writ action against P2, D1 and D2 and obtained judgment against them. The bank had also obtained an order for sale against P1's land. In order to avert the auction of the land, P1 paid a sum of RM1.8 million to the bank. The present action was P1's action against the defendants to satisfy and settle the loan to the bank and to P1 himself for the amount of RM2,394,610.38. The issues that arose for determination herein were: (i) whether the writ and statement of claim were validly served at D1 and D2's addresses; and (ii) whether a judgment in default entered for the chargor should be set aside or varied, since the sum owing has now been ascertained to be less than the judgment sum entered. E F G

Held (varying default judgments accordingly):

(1) Both the default judgments against D1 and D2 were regularly entered since the writs and statement of claims were properly served and there had been no defence on the merits shown. The default judgment could not therefore be set aside. There was also no reason given to explain the delay in filing the application to set aside the default judgment. (paras 27-28, 35, 42) H I

(2) A separate legal entity had charged its land as security for a loan to D1 and on the pain of its land being auctioned off, it has forked out RM1.8 million to avert that and to settle on behalf of D1 the loan sum in default. There was no doubt that P1 could recover from D1 the sum paid on its behalf to the bank, but only to the extent of what was actually paid and not the original sum of RM2,392,610.38. (para 46)

(3) On the authority of the Court of Appeal case of *Lee Tain Tshung v. Hong Leong Finance Bhd*, a court may vary a default judgment to reflect the correct amount instead of setting it aside. (para 52)

Case(s) referred to:

Am Securities Sdn Bhd & Anor v. Zulkefli Abdul Hamid [2008] 1 LNS 354 HC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat [1978] 1 LNS 15 FC ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Lee Tain Tshung v. Hong Leong Finance Bhd [2000] 4 CLJ 15 CA ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor [1996] 2 CLJ 586 FC ***(refd)***

Raja Abdullah Wahman Raja Sulaiman v. Nikseng Plantation Sdn Bhd & Ors [2007] 10 CLJ 657 HC ***(refd)***

Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 4 CLJ 175 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 98

Rules of the High Court 1980, O. 2 r. 1(1), (2), O. 3 r. 5, O. 10 r. 1(1), O. 13 r. 8, O. 42 r. 13, O. 92 r. 4

Other source(s) referred to:

Choong Yeow Choy, *Default Judgment: Principles and Procedure, 2006, LexisNexis*, Malaysia, p 162

For the plaintiffs - Lee Sze Yin; M/s ST Lee & Partners

For the defendants - Joshua Kevin (Leng Wie Mun with him); M/s Kevin & Co

Reported by Baizura Abd Razak

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] The sequence of events that unfolded in this case is not unfamiliar to many involved in the litigation process. A judgment in default of appearance is entered against a defendant and after some time when a bankruptcy action is taken against the defendant, the defendant now says the judgment was irregularly obtained as the writ was not properly served and that the judgment ought to be set aside.

[2] This case explores the issue of whether the writ served by AR Registered post is validly served at the address of the defendant but acknowledged by someone else. It also discusses the issue of whether a judgment in default entered for a correct sum should be set aside or varied when at the point of applying to set aside the sum owing has now been ascertained to be less than the judgment sum entered.

Parties

[3] The 1st plaintiff (P1) is a third-party Chargor that had charged its land in Ipoh to Bank Islam Malaysia Bhd ("the bank") for a loan given by the bank to the 1st defendant (D1), the borrower. The 2nd plaintiff, Chong Chee Chung, is a guarantor of the loan together with the 2nd defendant (D2). D2 is also a director and shareholder of D1.

[4] The bank gave a loan of RM2,890,000 on 29 June 2004 to D1 and D1 had defaulted in the loan repayments. The bank then proceeded on 28 May 2007 with a writ action against D1, D2 and P2 and subsequently obtained judgment against D1, D2 and P2 on 25 February 2009.

[5] The bank had also proceeded on 5 December 2008 with an originating summons in the Ipoh High Court against P1 for an order for sale on P1's land in Ipoh that had been charged to the Bank for the loan to D1 to recover the sum of RM2,394,610.38.

[6] Feeling the heat of the pressure the plaintiffs commenced an action in this court on 23 September 2010 against the defendants praying that:

(a) (i) that D1 and D2 pay the sum of RM2,394,610.38 to the Bank to satisfy and settle the loan forthwith; or

(ii) that D1 and D2 pay the sum of RM2,394,610.38 to P1 and P2 forthwith;

(b) costs;

(c) interest at the rate of 8% per annum on the sum of RM2,394,610.38 from the date of filing of the writ to date of full settlement.

Problem

[7] The writ and statement of claim herein were served on D1 at its registered office at 3A10, Block F, Phileo Damansara 1, Jalan 16/11, Off Jalan Damansara, 46350, Petaling Jaya, Selangor on 29 September 2010 and there was an acknowledgment by way of an initial beside the rubber stamp of D1 that was affixed onto the cover letter enclosing the writ and the statement of claim by way of service on D1.

[8] As D2 was not at the same address at that time, service could not be effected and another attempt to serve was made by the process server on 5 October 2010 but was told that D2 was not in. The process server in his affidavit of service filed on 1 November 2010 then proceeded to serve on D2 by posting on 6 October 2010 the writ and statement of claim at the General Post Office, Kuala Lumpur addressed to D2 at 3A10, Block F, Phileo Damansara 1, Jalan 16/11, Off Jalan Damansara, 46350, Petaling Jaya, Selangor.

[9] The process server exhibited the AR Card in exh. SD2 bearing the date of receipt 8 October 2010 and the initial of a recipient bearing NRIC No. 690806-03-5204 with the rubber stamp of EC Council Academy Sdn Bhd affixed on the recipient portion of the AR Card.

[10] The plaintiffs proceeded to file a certificate of non-appearance dated 10 December 2010 and 21 December 2010 against D1 and D2 respectively when no appearance was entered for both the defendants.

[11] A judgment in default was duly entered by the plaintiffs against both the defendants on 10 December 2010 based on the above prayers with costs of RM240.00.

[12] The sealed judgment was served on both D1 and D2 by hand addressed to both of them at the same address at 3A10, Block F, Phileo Damansara 1, Jalan 16/11, Off Jalan Damansara, 46350, Petaling Jaya, Selangor in a single cover letter and was acknowledged with the rubber stamp of D1 with an initial below it and the date 6 January 2011 written beside it. The two certificates of non-appearance were also served with the sealed judgment. See exh. A2A in the plaintiffs' affidavit filed on 12 April 2012.

[13] The plaintiffs then commenced a bankruptcy action against D2 and sought to make D2 a bankrupt for the judgment sum of RM2,394,610.38 plus interest of RM246,152.82 and costs of RM240.00 making a total sum of RM2,641,003.20 by their bankruptcy notice dated 4 January 2011.

Prayer

[14] Upon becoming aware of the bankruptcy action the defendants applied in encl. 8 to set aside the judgment in default taken against both of them under O. 42 r. 13 and O. 92 r. 4 of the Rules of the High Court 1980. The defendants also prayed for an extension of time to set aside the default judgment as well as for stay of execution till the hearing of the application and also for costs in the cause.

[15] The grounds stated were that:

(a) The defendants were unaware of the writ and statement of claim as they had not received them;

(b) The defendants were unaware of the judgment in default taken against then until the filing of the bankruptcy notice in the Shah Alam High Court on 4 January 2012;

(c) That from the affidavit filed by the plaintiffs as judgment creditors in the bankruptcy action they discovered that the writ and statement of claim were served on the wrong address which was not the defendants address.

[16] Nothing was mentioned in the affidavits of the defendants that they have a defence on the merits and that no proposed defence was filed in support of their application to set aside the default judgment.

[17] In the circumstance, I take it that the defendants/applicants are standing solely and singularly on the fact that the default judgment is an irregular judgment and that it ought to be set aside *ex debito justitiae*.

Principle

[18] It goes without saying that if the writ and statement of claim are properly served then the judgment is a regular judgment and there would then be a need for the defendants to show a defence on merits before they can set aside the default judgment. Conversely if the writ and statement of claim are not properly served then the default judgment entered against the defendants is an irregular one and the defendants would be entitled to set it aside as of right.

Whether Service On D1 Was Proper Service

[19] Service on D1 was at the registered office of D1 at 3A10, Block F, Phileo Damansara 1, Jalan 16/11, Off Jalan Damansara, 46350, Petaling Jaya, Selangor. The cover letter enclosing the writ and statement of claim was duly acknowledged with the rubber stamp of D1 duly affixed onto the said cover letter with an initial beside it and the date 29 September 2010 and time 11.30am written on it. See exh. A1 in affidavit in reply of the plaintiffs in encl. 9. D1 merely stated in its affidavit in support of its application in encl. 7 in para. 6 that the address of D1 is wrong without stating what is the correct registered office address. D1 has not explained how then if it was the wrong address then how its rubber stamp had been affixed onto the cover letter enclosing the writ and statement of claim.

[20] I am more than satisfied that the writ and statement of claim had been duly served and that the default judgment is a regular judgment. There was no affidavit descending to the merits of its defence if it has one other than by a vague reference in para. 9 that it ought to be allowed to file its defence. No proposed defence has been filed or attached to the affidavit in support. In the circumstance, the default judgment ought not to be set aside.

[21] The default judgment was duly served on D1 at the same registered office on 6 January 2011 and duly acknowledged with the rubber stamp of D1 affixed onto the cover letter and an initial below it stating the date of receipt as well. See exh. A-2A of encl. 9. There was unexplained delay of some 14 months until the application to set aside the default judgment was filed on 30 March 2012.

[22] The position of the law on delay in setting aside a default judgment has been succintly summarised in the dicta of His Lordship Edgar Joseph Jr, JCA (as he then was) in the Federal Court case of *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586; [1996] 1 MLJ 374 at p. 376:

> (5) Lapse of time is no bar to a defendant's application to set aside a judgment which is a nullity. Further, under its inherent jurisdiction to prevent an abuse of proceedings, the court has power to set aside a judgment in default despite the defendant's application being out of time if the particular circumstances of the case require it (see pp. 384I and 385A-C); *Attwood v. Chichester* [1878] 3 QBD 722 and *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241 followed ...

[23] His Lordship went on to opine at pp. 381, 382, 383, 384 and 385 as follows:

> In other words, in my view, O. 83 r. 2(4) is merely a statutory enunciation of the fundamental rule of natural justice as expressed in the *Latin maxim audi alteram partem* (hear the other side) so that the obligation to serve notice of the adjourned hearing of the originating summons remained even if O. 83 r. 2(4) did not apply. It is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem*. It was said by

A Fortescue J in *R v. University of Cambridge* [1723] 1 Stra 557, where Dr Bentley had been deprived of his academic degrees by decree, that the principles goes back to the garden of Eden. This is how his Lordship put it:

> The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called on to make his defence. 'Adam' (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also.

In my view, the effect of failure on the part of the chargees to notify the chargors of the date of the adjourned hearing was of such fundamental importance as to render each and every one of the *ex parte* orders obtained, in consequence, a nullity. I am supported in this by certain authorities to which I shall now refer.

In my view, lapse of time is no bar to a defendant's application to set aside a judgment which is a nullity. (See Attwood v. Chichester [1878] 3 QBD 722). I am further supported in this by the following passage in a very recent judgment of the Federal Court in Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad [1996] 1 CLJ 241 at p. 253 is satisfied that:

(a) no one has suffered prejudice by reason of the defendant's delay;

(b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or

(c) to let the judgment stand would constitute oppression. (See Attwood v. Chichester [1878] 3 QBD 722; Harley v. Samson [1914] 30 TLRL 450.

We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, *the court has power to set aside a judgment in default, despite the defendant's application being out of time if the particular circumstances of the case require the intervention of the court.* (See *Beale v. MacGregor* [1886] 2 TLR 311). (emphasis added)

[24] While the above case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad (supra)* was decided before the introduction of O. 42 r. 13 Rules of the High Court on 1 August 1993, the principle of acting with purposeful promptitude subject to the court's inherent power to extend time in a circumstance that so justify it has not changed.

[25] Order 42 r. 13 Rules of the High Court reads:

> Setting aside or varying judgments and orders
>
> Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment **within thirty days after the receipt of the order or judgment by him**. (emphasis added)

[26] The court's discretion to extend time to make an application to set aside the default judgment is clearly spelt out in O. 3 r. 5 Rules of the High Court 1980. The defendants have rightly taken advantage of this discretion that could be exercised in its favour where delay outside the period of thirty days is concerned but alas they have not given any reasons justifying or excusing the delay.

[27] In the circumstance this court would not set aside the default judgment against D1 as the default judgment entered is a regular judgment and there has been no defence on the merits shown. Furthermore there has been no reason given to explain the delay.

[28] I shall deal later with whether the default judgment against D1 should be varied seeing that the plaintiffs' counsel was prepared to admit that though the judgment sum entered in the default judgment was correct, subsequent events have transpired such that the final sum paid by P1 to save P1's land from being auctioned and to discharge the third-part charge over P1's land was for a much lesser sum of RM1.8 million.

Whether Service On D2 Was Proper Service

[29] As stated in the affidavit of service filed in encl. 3 and in the affidavit of reply of the plaintiffs in encl. 9 and in particular at exh. A2 in encl. 9 where the cover letter enclosing the writ and

statement of claim addressed to D1 at 3A10, Block F, Phileo Damansara 1, Jalan 16/11, Off Jalan Damansara, 46350, Petaling Jaya, Selangor and the AR Registered post Advice of receipt were exhibited. The date of receipt of 8 October 2010 was written on the AR Card and the initial of a recipient bearing NRIC No. 690806-03-5204 with the rubber stamp of EC Council Academy Sdn Bhd affixed on the recipient's portion of the AR Card.

[30] D1 feigned ignorance and said at para. 6 of his affidavit in support in encl. 7 that the writ and statement of claim were not sent to him but to a company called EC Council Academy Sdn Bhd. In para. 7 D2 stated that both D1 and him do not know EC Council Academy Sdn Bhd. But truth be told, D2 had himself in his affidavits filed in encl. 7 and 11 stated his address as at 3A10, Block F, Phileo Damansara 1, Jalan 16/11, Off Jalan Damansara, 46350, Petaling Jaya, Selangor. D2 is thus estopped from denying that that is his address. What is more revealing and embarrassing to D2 is Company Commission of Malaysia's search on EC Council Academy Sdn Bhd which shares not just the same registered address as D1 and D2 but also that D2 is a director of EC Council Academy Sdn Bhd and a shareholder that holds practically all of the 100,000 shares in the company save for one. D2 has been less than candid in his affidavit in trying to create the impression that he does not know EC Council Academy Sdn Bhd at all. One would be entitled to presume that the recipient of the letter with the authority to affix the rubber stamp of EC Council Academy Sdn Bhd on the letter would be bringing the writ and statement of claim to the addressee D2.

[31] In any event, D1 that shares the same address as D2 would in the ordinary course of things, have knowledge by reading the writ and statement of claim that D2 had also been named in the document; D2 being a director and shareholder of D1. A person who chooses to share address with some other person(s) must be presumed to be willing to take the risk that when court documents are served at that address, someone else might be receiving it on its behalf and it is for the person to rebut the presumption that he did not receive it by asking at least the recipient of the court documents to affirm an affidavit that the documents were not passed on to him. As D2 owns practically the whole of EC Council Academy Sdn Bhd, it would not be difficult for him who

is also a director of the company to get its staff who is its manager to affirm an affidavit that no court process was served on 8 October 2010. Nothing has been forthcoming other that D2's self-serving averment to the fact in encl. 11 in para. 7 that no staff of D1 has that NRIC No. 690806-03-5204 (wrongly typed as 690806-03-4204) and of course D2 has deftly avoided finding out or perhaps more a case of him shutting himself out from inquiring if another company owned practically by him has such a staff. Generally most staff and even an office boy or a driver would know who is the owner of a company and who calls the shots. Owning 99,999 of the 100,000 shares in the Company EC Council Academy Sdn Bhd would make him practically the owner of the company and it is unlikely that the one who received the letter sent by AR Registered Post would not have passed on the letter to the boss.

[32] A closer look at O. 10 r. 1(1) Rules of the High Court 1980 reveals the following:

> Subject to the provisions of any written law and these rules, a writ must be **served personally on each defendant or by sending it by prepaid AR registered post addressed** to his last known address and so far as is practicable, the first attempt at service shall be made not later than one month from the date of issue of the writ. (emphasis added).

[33] The provision of service by prepaid AR registered post is clearly and contrastingly an alternative to the personal service which has been understood to mean that the process is served by hand and received personally by the defendant. If the Rules of the High Court 1980 have wanted the element of receipt by the defendant to whom the AR letter and card is addressed, it could easily have provided for it.

[34] The Court of Appeal in *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175 has addressed this issue where at p. 185 His Lordship James Foong JCA (later FCJ) opined:

> [20] In this instance, the plaintiffs had elected to serve the writ and statement of claim on this defendant by way of sending it by prepaid A.R. registered post. This defendant did not challenge that such process was never undertaken. Once this process was carried out, it is our view that there is no

provision in law to say that the plaintiffs must also prove that the person so named in the post had received it. This opinion is shared by Suriyadi Halim J (as he then was) when he said in *Pengkalen Concrete Sdn Bhd v. Chow Mooi & Anor* [2003] 6 CLJ 326:

> In fact under sub-r. 1(1) of O. 10, nothing is indicated that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it ie, if it was sent by prepaid AR registered post. I therefore was satisfied that as in this case, if all the prerequisites were fulfilled, as the plaintiff had done so, the recipient being "Yanti" (not the name of the defendants) did not vitiate that service.

[21] This sentiment seems to be repeated in another High Court decision of *MBf Finance Bhd v. Tiong Kieng Seng* [2001] 4 CLJ 38. Thus, once the writ and statement of claim are sent by AR registered post it is *prima facie* proof of service unless the defendant is able to rebut this.

[35] Having come to the conclusion that the writ and statement of claim have been validly served on D2 and that the default judgment entered is regular, I shall now proceed to deal with the issue of whether there is a defence on the merits. As was expressed by His Lordship James Foong JCA (later FCJ) in *Yap Ke Huat*'s case *(supra)* at p. 186:

> [23] When the judgment is a regular judgment, this defendant:
>
> must show to the court that he has a defence that has some merits of which the court should try. To use common and plain language, the applicant must show that *his defence is not a sham defence but one that is prima facie, raising serious issues as a bona fide reasonable defence that ought to be tried* because obviously if the defence is a sham defence, there is no defence and the application must fail - Jemuri Serjan CJ (Borneo) in *Hasil Bumi Perumahan Sdn Bhd & 5 Ors v. United Malayan Banking Corp Bhd (supra)*. (emphasis added)

[36] All that D2 has said in paras. 11 and 12 is that the default judgment ought to be set aside so that he can file his defence to the plaintiffs' claim and that he has merits on the issues that will be raised in his defence.

[37] The above averments of a general nature and not stating specifically what is the defence and not descending on any details at all, do not amount to showing a defence on merits or a *prima facie* defence or a *bona fide* reasonable defence.

[38] In *Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat* [1978] 1 LNS 15; [1979] 1 MLJ 23 at p. 24, Raja Azlan Shah (Ag CJ Malaya as His Royal Highness then was) in delivering the judgment of the Federal Court declared that the requirement that there must be an affidavit of merits is an inflexible rule:

> It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a Defence on the merits.

[39] In *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 at pp. 313-314 His Lordship Mohd Azmi FCJ expressed this principle in this wise:

> ... where the default judgment has been obtained regularly, in order to succeed the defendant must file an affidavit of merits, ie the defendant must disclose by affidavit evidence that *prima facie* he has a defence on the merits. Put in another way, the affidavit must disclose that he has an arguable or triable issue on the merits.

[40] D2's affidavits in encls. 7 and 11 have fallen far short of an affidavit that discloses an arguable or triable issue on the merits.

[41] The learned author Choong Yeow Choy in *Default Judgment: Principles and Procedure*, 2006, LexisNexis, Malaysia at p. 162 wrote as follows:

> In requiring the defendant to show defence on the merits, the courts have held that mere denials or allegations to the effect that, for example, 'the defendant is no longer indebted to the plaintiff' or that the 'principal debtor had not committed any breach of the loan agreement' fall short of satisfying the court that there were indeed defence on the merits. In *Hongkong & Shanghai Banking Corporation v. Ismail bin Daud & Anor* [1978] 2 MLJ 160, Mohd Zahir J said that some evidence must be produced to back up any of the details or allegations made in the statement of defence and affidavit.

[42] There being no affidavit on merits I am not inclined to set aside the default judgment against D2.

Whether The Default Judgment Against D1 And D2 Should Be Varied

[43] Order 13 Rules of the High Court 1980 deals with judgment in default of appearance. O. 13 r. 8 specifically allows the court to vary the default judgment in a case that justifies it. It reads:

> Setting Aside Judgment
>
> The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

[44] It was admitted that the default judgment taken against D1 and D2 was for the correct amount at the time it was entered on 10 December 2010 as that was the amount that the Bank was claiming against the plaintiffs. However subsequent negotiations with the bank have led to the bank accepting a sum of RM1.8 million to avert the auction of P1's land and a payment of RM189,501.10 from D2 as settlement for the amount claimed, as reflected in the bank's letter of 8 September 2011 which letter was not disputed by learned counsel for the plaintiffs.

[45] Should the default judgment then be set aside considering that the lesser sum settled was only hammered out on 8 September 2011 and not when the default judgment was entered on 10 December 2010? Should the default judgment be allowed to stand against the defendants when the plaintiff now admits that finally P1 only paid RM1.8 million to the bank?

[46] I am of the view that in all fairness to both the plaintiffs and the defendants, the reduced sum now is not strictly speaking the fault of the plaintiffs. However to allow the sum to remain would expose the defendants to the danger of having a judgment enforced against them for a sum higher than what was actually owing. P1 did not pay RM1.8 million to the bank gratuitously. It is not disputed that the loan was for D1 irrespective of whether P2 has any interest in D1. Learned counsel for the defendants said at page 6 of his submission that P2 was once a director of D1 before he resigned and as such P2 benefited from the loan as well. I do not think in the absence of a separate arrangement between the co-guarantors P2 and D2, and none has been shown,

there is a need to go into who benefited from the loan as between the two co-guarantors. Neither is it necessary to consider the benefit to P1 by virtue of P2's directorship of D1. What is obvious here is that a separate legal entity in P1 had charged its land as security for a loan to D1 and on the pain of its land being auctioned off, it has forked out RM1.8 million to avert that and to settle on behalf of D1 the loan sum in default. There is no doubt that P1 has a cause of action against D1 to recover from it the sum paid on its behalf to the Bank but only so much as was paid and not the original sum of RM2,394,610.38.

[47] Section 93 Contracts Act 1950 is in point and it confers a right on P1 to recover from D1 the principal debtor and it reads:

> 93. Rights of surety on payment or performance.
>
> Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, *the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.* (emphasis added)

[48] Indeed the nature of a third party charge was explained by His Lordship Gopal Sri Ram JCA (later FCJ) in the Supreme Court case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 at pp. 42-43 as being akin to a secured guarantee:

> The appellant is the registered proprietor of all that land held under HS(D) 2974 for Lot No. 11041 in the Mukim of Sungei Buloh ("the said land"). On 2 October 1985, she executed a charge over the said land in favour of the respondent to secure a loan of RM600,000 granted by the respondent Bank to one Zinger Feedmill Sdn. Bhd. ("the borrower"). This is commonly known among the members of the legal profession as a "third party charge". It denotes a charge by a registered proprietor over his land to secure a loan made by the lender to a third party. As correctly submitted by Counsel, it is nothing more than a **secured guarantee**. (emphasis added)

[49] Section 98 Contracts Act 1950 provides for an implied promise to indemnify the surety. It reads:

> In every contract there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee; but not sums which he has paid wrongfully.

[50] In *Am Securities Sdn Bhd & Anor v. Zulkefli Abdul Hamid* [2008] 1 LNS 354 His Lordship Wahab Patail J (later JCA) observed as follows:

> 27. Section 93 of the Contracts Act 1950 (1) provides that "where a guaranteed debt becomes due ... the surety, upon payment of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor". In *Securities (Melaka) Sdn Bhd v. Yap Nee Seng* [1998] 1 LNS 199 it was stated that section 93 of the Contracts Act 1950 is the embodiment of the equitable remedy of subrogation. It is essential however for the surety to have paid all that he is liable for. Where there payment has not been paid in full for all that he is liable for, the 2nd Plaintiff cannot claim on the basis of subrogation. The 1st Plaintiff remains entitled to maintain his full claim, and the 2nd Plaintiff's liability to the 1st Plaintiff applies on the balance the 1st Plaintiff is unable to collect from the Defendant.

[51] Here is a case where the sum for which default judgment was entered against D1 was correct at the point when judgment was entered. Subsequently when the default judgment was being applied to be set aside by D1, the sum is now ascertained to be only RM1.8 million. This is a fit and proper case for the court to vary the default judgment to reflect the correct amount now owing.

[52] Even in a case where a default judgment has been entered for a bigger sum than what was actually owing, the Court of Appeal in *Lee Tain Tshung v. Hong Leong Finance Bhd* [2000] 4 CLJ 15 has held that there may well be circumstances that would constrain the court to vary the default judgment to reflect the correct amount instead of setting it aside. The court's discretion and power to do so is expressly provided for in O. 2 r. 1(2) and O. 2 r. 1(1)(2) are reproduced below:

> Order 2. Effect of Non-Compliance
>
> 1. Non-compliance with rules. (O. 2 r. 1)
>
> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other

respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3) the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, **set aside either wholly or in part the** proceedings in which the failure occurred, any step taken in those proceedings or any document, **judgment or order therein** or exercise its powers under these rules **to allow such amendments (if any) to be made** and to make such order (if any) dealing with the proceedings generally as it thinks fit. (emphasis added)

[53] His Lordship NH Chan JCA at p. 42 of *Lee Tain Tshung*' case *(supra)* observed as follows in a careful exposition of the new regime introduced by O. 2 r. 1(2) Rules of the High Court 1980 *vis-a-vis* the court's power to vary the judgment in an application to set aside the default taken for a bigger amount:

In the present case, it will be recalled, the plaintiff (the respondent) had obtained judgment against Lee (the appellant) after striking out his defence in an application under O. 18 r. 19 which was heard *inter partes*. That was on 16 February 1987. Lee did not appeal. Instead, some eight years later, in January 1995, he filed a summons to set aside the judgment.

If it had been a regular judgment then Lee's recourse was to appeal. But he did not appeal. Instead, he applied to have the judgment set aside which he could do if the judgment had been irregularly obtained. Lee claims the judgment was irregular because it was obtained for an amount in excess of what was due. In *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 Gopal Sri Ram JCA said at 482:

Now, it is an established principle that in monetary claims, the amount for which judgment is entered must be limited to the amount actually due: *Hughes v. Justin* [1894] 1 QB 667, *Muir v. Jenks* [1913] 2 KB 412. ... If judgment is entered for more than is actually due, it is liable to be set aside.

If an error appears in the judgment then this may be corrected in the following circumstance:

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(i) on an application duly made by the plaintiff in that behalf: *Armitage v. Parsons* [1908] 2 KB 410;

(ii) on an application made by the defendant to set aside the judgment: *Ban Hin Lee Bank Bhd v. Somali Bank (The Independent*, 28 November 1988), CA; and

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(iii) *ex parte*, where the defendant consents to such a course.

The above *dicta* regarding the circumstances on which an error in the judgment amount may be corrected require some explanation lest it be misunderstood. If judgment was obtained for

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the wrong amount, it is true the plaintiff may apply to have the judgment amount corrected. This is because O. 2 r. 1(2) empowers the court "to allow such amendments (if any) to be made". Strictly speaking, the authority for this is not *Armitage v. Parsons* [1908] 2 KB 410 which is an old case decided long before

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O. 2 took its present form but is the rule (r. 1(2)) itself which empowers the court to amend. *But on an application made by the defendant to set aside the judgment because it was entered for too much, the court may under O. 2 r. 1(2) set aside either wholly or in part the judgment or (regardless of who had initiated the application to set aside) exercise its powers under the RHC "to allow such amendments (if any)*

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to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit". Compare this with the previous position under the old cases of *Hughes v. Justin* [1894] 1 QB 667 and *Muir v. Jenks*, *supra*, where the law was that unless the party who held the judgment applied to have the incorrect sum put right, the

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defendant was (upon the authority of *Hughes v. Justin*) entitled as of right to have the judgment for the incorrect amount set aside. See Buckley LJ in *Muir v. Jenks*, *supra*, at 417 where he said:

> ... *Hughes v. Justin* is an authority for the following proposition: If the plaintiff in the absence of the defendant,

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> proceeding properly under the rules, signs judgment for a sum in excess of that which is due to him, the defendant is entitled to have that judgment set aside, unless the party who holds the judgment applies as he may to reduce it to the proper amount.

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> If application to amend be duly made it may be right not to set the judgment aside but to reduce it to the proper sum; but unless the party who holds the judgment elects to have it put right, then upon the authority of Hughes v. Justin it seems to me the defendant is entitled to say "This

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> is a wrong judgment, set it aside." In the case of *Armitage v. Parsons* the right to amend which I have mentioned was exercised.

There was then no power as there is now in O. 2 r. 1(2) for the court to allow amendments to be made without regard to who had initiated the application to have the judgment set aside.

In the present case, unfortunately for him, Lee's only recourse was to apply under O. 2 r. 2 to have the irregular judgment set aside. He was unable to apply under any other provision of the RHC because the judgment that had been obtained against him was not a default judgment. In this appeal we are unanimous in our opinion that he was not entitled to have the judgment, even though it was irregular, set aside under O. 2 r. 2 because we are of the view that his summons to set this judgment aside had not been issued within a reasonable time (see O. 2 r. 2(1)). By allowing eight years to elapse after the irregular judgment had been obtained against him before taking action on it has, in our judgment, precluded him from being allowed to have the judgment set aside because of his unreasonable delay in making his application (O. 2 r. 2(1)). The judge below was right to have dismissed the application. We have, therefore, affirmed his decision and dismissed the appeal. *But now, since the matter has been brought to our attention, this court on recognising the irregularity of the incorrect amount on the judgment, has the power under O. 2 r. 1(2) to correct the error in the judgment by amending it to the correct amount regardless of who had initiated the application to have the judgment set aside. This we do by correcting the judgment sum to the amount that is due.*

The error arose in this way. I will let the judge below take up the story. This is what Charles Ho J said:

> It is conceded by Miss Willie that the amount of tax indemnity should not have been included in the judgment sum of RM1,211,523.66. The mistake arose in this way. At the time the Plaintiff instituted the action they were entitled to include the claim for tax indemnity in respect of the leased equipment because if the leased equipment were disposed of or sold within 2 years they would have to pay the Government for the capital allowance. However, by the time they obtained judgment on 16th February, 1987, the 2 years period had elapsed and the Plaintiffs were no longer liable to pay the Government the capital allowance. Thus, the Plaintiffs (were) no longer entitled then to make the claim for tax indemnity against the Defendants.
>
> This fact seemed to have escaped the attention of both the parties and the Court during the hearing of the O. 18 r. 19 application.

A It is not disputed that when the mistake was discovered the solicitors for the Plaintiffs on 11.7.89 wrote to the then solicitors of the 3rd Defendant, Messrs David Fung & Co. to notify them that the original judgment sum has been reduced by the amount of the tax indemnity ie, the sum of RM93,362.37 and the 3rd Defendant's solicitors acknowledged this on the same date. The Plaintiffs in their execution proceedings have never sought to enforce this part of the judgment. This is reflected in the statements of account rendered to the 3rd Defendant.

In the circumstance the Defendants have not been prejudiced or made to suffer any loss as a result of the mistake.

This is plainly a case where we should put the matter right and this we do by amending the judgment to reflect the correct amount, which is RM1,117,161.29 (1,211,523.66 - 93,362.37). (emphasis added)

[54] A *fortiori*, if a judgment obtained for a bigger sum than the amount actually owing may be varied or amended instead of being set aside wholly, how much more in an application to set aside a judgment which though correctly entered then, has now been confirmed for a lesser sum, be varied or amended accordingly to avoid execution for a bigger sum. This is not a case of having made payments after judgment and thus reducing the judgment sum but a case where through subsequent negotiations with the bank the sum that P1 had to pay the bank was reduced to RM1.8 million and correspondingly the sum that D1 has now to pay P1 has to be reduced and varied to RM1.8 million.

[55] Learned counsel for the defendants though conceding that justice of the case would be best served by this court making such an order, yet humbly implored this court not to record that D1 has consented to such an order for he has no instruction from his client to consent to such an order being made.

[56] I have no doubt that O. 2 r. 1(2) Rules of the High Court 1980 was worded widely so as to allow the court to meet the ends of justice without being hamstrung in any way by the strict rules of procedure.

[57] I therefore ordered judgment by P1 against D1 to be varied to RM1.8 million accordingly.

[58] Then there is the issue of the default judgment entered by P1 against D2 for the sum of RM2,394,610.38. Both P2 and D2 are co-guarantors for the loan. In the absence of any agreement to the contrary they are deemed to be equally liable for the settlement sum. Section 99 Contracts Act 1950 provides that:

> **99. Co-sureties liable to contribute equally.**
>
> Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

[59] Each of the two co-guarantors must pay each an equal share of the whole debt. The sum that D2 should be held liable should only by half the sum of RM1.8 million as the other co-guarantor is P2, a director of P1 and we can presume that P1 would not be suing P2. It is not unlike a case where the principal debtor is required to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee under s. 98 Contracts Act 1950. Here instead of P2 and D2 requiring to pay jointly and severally the sum of RM1.8 million, the sum has been paid by P1. The guarantor is vested with all the rights of the creditor bank against the borrower/principal debtor under s. 92 Contracts Act 1950. Further D2 has paid a sum of RM189,501.10 in full and final settlement of his liability to the bank.

[60] Be that as it may, *inter se* between P1, who put up the security for the loan and who had to fork out RM1.8 million to pay D1's loan owing to the bank, and D2, there is a need to do some equalization exercise such that the demands of justice and equity be met consistent with ss. 92 and 98 Contracts Act 1950. Justice of this case would be served if P1 be allowed to enter judgment against D2 for the sum of RM1.8 million divided by 2 ie RM900,000 minus the sum of RM189,501.10 that D2 had paid the bank which gave a sum of RM710,498.90 which sum was

A confirmed by learned counsel for both sides. Whilst learned counsel for the P1 readily agreed to such a reduced judgment sum following the variation of the default judgment, learned counsel for D2 candidly conveyed to the court his request that it be not recorded as D2 having consented as he had no instructions from B D2 to consent to the variation of the default judgment.

[61] I then turned to consider whether the default judgment taken by P2 against D1 and D2 could stand for the lesser sum claimed. Section 99 Contracts Act 1950 is clear in that where C there are 2 co-sureties, the liability between themselves is an equal share of the whole debt. However as P2 is not the co-guarantor that had paid the sums outstanding to the bank, it would appear that P2 does not have an accrued cause of action against D1 and D2. Learned counsel for the plaintiffs admitted this and agreed D that the default judgment by P2 against D1 and D2 be set aside and the action by P2 against D1 and D2 be withdrawn and so I struck out the claim by P2 against D1 and D2 with no liberty to file afresh.

E **[62]** As stated in *Raja Abdullah Wahman Raja Sulaiman v. Nikseng Plantation Sdn Bhd & Ors* [2007] 10 CLJ 657 at p. 662, His Lordship Abdul Aziz Mohamed J (as he then was) observed:

> [24] The plaintiff commenced his action before he had paid the bank, but after his liability as guarantor had been established F and he had been ordered to pay to the bank the company's debts. The second defendant's counsel submits that in law *a guarantor has no right to demand contribution from another co-guarantor until he has made payment to the creditor. That, I agree, is the correct position in law where the contribution that is sought by the guarantor is contribution to himself.* (emphasis added)

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[63] By the same token P2 who had not paid any sum under the guarantee is not entitled to a contribution or indemnity from D1 under s. 98 Contracts Act 1950. It was P1 that paid the sum of RM1.8 million to discharge D1's liability to the bank.

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Pronouncement

[64] In the upshot and for the reasons given above, I varied the default judgment to the following extent:

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(a) Judgment by P1 against D1 be varied and entered for RM1.8 million;

(b) Judgment by P1 against D2 be varied and entered for RM710,498.90;

(c) By consent judgment by P2 against D1 and D2 be set aside and as learned counsel for P2 is withdrawing the action by P2 against D1 and D2, P2's claim was struck out with no liberty to file afresh;

(d) Interest at the rate of 4% per annum on the two judgment sums in 1 and 2 above from date of order to date of realisation; and

(e) Defendants to pay costs of RM1,000 to P1.